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No. 01-1444

In The
Supreme Court of the United States

BEN CHAVEZ,

Petitioner,

v.

OLIVERIO MARTINEZ,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR AMICUS CURIAE THE CITY OF ESCONDIDO IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE[1]

The City of Escondido is a municipal corporation employing a police department. The City finds that imposition of undue civil liability on municipalities has a negative effect on the ability of municipalities to investigate crime, retain qualified police officers, and provide for public safety.

Aside from its general interest in issues of civil liability affecting police officers, the City is a defendant in a civil rights suit alleging, among other things, the violation of Fifth Amendment rights as a result of custodial interrogations, even though the incriminating statements were never introduced at a trial.

SUMMARY OF ARGUMENT

In the case before the Court, the Ninth Circuit Court of Appeals has held that even though Oliverio Martinez' statements were not used against him in a criminal proceeding, the custodial interrogation violated his Fifth Amendment rights and gave rise to a civil claim under 42 U.S.C. Section 1983. (*Martinez v. City of Oxnard*, 270 F.3d 852 (9th Cir. 2001).) To reach this conclusion, the Ninth Circuit has relied on its own controversial decision in *Cooper v. Dupnik*, 963 F.2d 1220, 1251 (9th Cir. 1992) (a

[1] The City of Escondido submits this amicus curiae brief pursuant to Supreme Court Rule 37.4. No counsel for a party authored this brief in whole or in part, and no person other than the amicus made a monetary contribution to the preparation or submission of the brief.

Fifth Amendment violation is complete at the time of the offending behavior). What is notable about the *Martinez* decision is its ready acknowledgement that its conclusion contradicts the Supreme Court's pronouncement in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990), that the Fifth Amendment is a trial right that can only be violated at trial. *Martinez* overcomes this contradiction by describing the Supreme Court's pronouncement as "dicta."

Other circuits have soundly criticized the Ninth Circuit's holding in *Cooper* that a Fifth Amendment violation is complete at the station house. The well-reasoned opinions of the other circuits all point to one thing, which *Martinez* chooses to disregard: The Supreme Court has very emphatically stated, in opinions pre-dating and following *Verdugo-Urquidez*, that the Fifth Amendment right against self-incrimination is a fundamental *trial* right (*Withrow v. Williams*, 507 U.S. 680, 691 (1993)), which "applies only when the accused is compelled to make a testimonial communication that is incriminating." (*Fisher v. United States*, 425 U.S. 391, 408 (1976).)

There is an uneven split among the circuits regarding whether the Fifth Amendment right against self-incrimination is complete at the moment of coercion. The Ninth Circuit stands alone on this issue, and its position squarely contradicts this Court's decisions regarding the nature of the Fifth Amendment right against self-incrimination. Furthermore, the holding imposes a chilling effect on law enforcement's ability to discharge its duties with appropriate zeal.

ARGUMENT

I. THE FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION CAN ONLY BE VIOLATED AT TRIAL

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." In *Verdugo-Urquidez,* the Court explained that the Fifth Amendment can be violated by the introduction *at trial* of an illegally-obtained statement: "The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants. Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial." (494 U.S. at 264.)

Most circuits considering the Fifth Amendment right against self-incrimination have strictly adhered to the language of the Fifth Amendment and this Court's pronouncement that it is a trial right. In *Davis v. City of Charleston*, 827 F.2d 317, 322 (8th Cir. 1987), the Eighth Circuit Court of Appeals held that the Fifth Amendment right against self-incrimination is not violated where statements obtained during custodial interrogations are not used against the declarant during trial. Relying on *Withrow* and *Fisher*, the Fourth Circuit has held that the Fifth Amendment right against self-incrimination is not violated unless the statement is used against the suspect at trial. (*Riley v. Dorton*, 115 F.3d 1159, 1165 (4th Cir. 1997).) Although the Sixth Circuit has not specifically addressed the issue, the District Court in *Grooms v. Marshall*, 142 F.Supp.2d 927, 937 (S.D. Ohio 2001) recently held that indicted suspects who are never tried cannot raise a Section 1983 claim for violation of their Fifth Amendment right based upon coercive custodial

interrogations because the Fifth Amendment is a trial right.

The well-reasoned approach of the Fourth and Eight Circuits is echoed in the dissenting opinion of Justice Brunetti in *Cooper*: it is the use of the coerced statement at trial that constitutes a Fifth Amendment violation. (*Cooper*, 963 F.2d at 1254). Justice Brunetti's dissent is cited with approval by other circuits as presenting "persuasive arguments" regarding when the right against self-incrimination is violated. (*See, e.g., Wiley v. Doory*, 14 F.3d 993, 998 (4th Cir. 1994); *Giuffre v. Bissell*, 31 F.3d 1241, 1256 (3rd Cir. 1994) (expressing approval for the dissenters' position in *Cooper*); *Jones v. Cannon*, 174 F.3d 1271, 1291 (11th Cir. 1999) (agreeing with the dissent in *Cooper* that the majority "has departed from the clear requirements for Section 1983 actions").)

The Second Circuit has held that while the Fifth Amendment is not violated at the moment of coercion, it is violated if the self-incriminating statement is used in a grand jury proceeding. (*Weaver v. Brenner*, 40 F.3d 527, 535 (2nd Cir. 1994).) Thus, under the Second Circuit's interpretation, the "use or derivative use of a compelled statement at *any* criminal proceeding against the declarant violates that person's Fifth Amendment rights." (*Id.*) Although the Seventh Circuit has not specified at what point in a criminal prosecution the Fifth Amendment right is violated, it has generally held that the Fifth Amendment does not forbid the forcible extraction of information, but only the use of that information as evidence in a "criminal case". (*Mahoney v. Kesery*, 976 F.2d 1054, 1062 (7th Cir. 1992), quoting *Wilkens v. May*, 872 F.2d 190, 194 (7th Cir. 1989).)

Among the circuits, the Ninth Circuit stands alone in holding that the Fifth Amendment right against self-incrimination is violated at the station house. Citing only its own decision in *Cooper*, the Ninth Circuit in *Martinez* has stated that the purpose of the Fifth Amendment is "to prevent coercive interrogation practices that are destructive of human dignity." (*Martinez*, 270 F.3d at 857.) Ascribing such broad purposes to the Fifth Amendment, the Ninth Circuit has held that the Fifth Amendment's protection extends "not just over the courthouse, but also over the jailhouse, the police station, and other settings in which law enforcement authority was invoked." (*Id.*)

It is Justice Brunetti's dissent in *Cooper*, and the holdings of the Eighth and Fourth Circuits, and the District Court in Ohio, that follow Supreme Court precedents. Well before *Verdugo-Urquidez*, the Supreme Court stated the Fifth Amendment's "sole concern is to afford protection against being forced to give testimony leading to the infliction of penalties affixed . . . to criminal acts." (*Kastigar v. United States*, 406 U.S. 441, 453 (1972).) In *Ullman v. United States*, 350 U.S. 422, 438-439 (1956), the Supreme Court stated that the concern of the Fifth Amendment is to prevent the danger of being forced to give testimony leading to the infliction of penalties. Therefore, the pronouncement in *Verdugo-Urquidez* is based on long-standing Supreme Court holdings that the Fifth Amendment safeguards against testimonial self-incrimination in a criminal trial that leads to the imposition of penalties.

As *Verdugo-Urquidez* recognized, pre-trial police conduct may *ultimately* impair a suspect's Fifth Amendment right, but a violation of that right occurs only if the statement is admitted in trial against the accused. Even though

the right against self-incrimination extends to the station house, and police conduct at that point can make the statement involuntary, the Fifth Amendment cannot be violated at the station house because the purpose of the Fifth Amendment is to create fairness ***at trial***. (*See, e.g., Bram v. United States*, 168 U.S. 532 (1897) (Fifth Amendment bars the introduction *at trial* of involuntary confessions made during custodial interrogations); *Johnson v. New Jersey*, 384 U.S. 719, 730 (1966) (*Miranda* guards against the use of unreliable statements *at trial*); *Schneckloth v. Bustamonte*, 412 U.S. 218, 240 (1973) (basis of suppression decision is to protect the fairness of the *trial* itself).) In *Withrow*, the Supreme Court relied on *Verdugo-Urquidez* in holding that the Fifth Amendment safeguards against the use of unreliable statements *at trial*. (*Id.* at 691-692.) Very recently, in *Dickerson v. United States*, 530 U.S. 428 (2000), the Supreme Court held that *Miranda v. Arizona*, 384 U.S. 436 (1966), is a constitutional decision that governs the admissibility of statements made during custodial interrogation in both state and federal courts. (530 U.S. at 432.) In *Miranda*, the Court's concern was that reliance on the traditional totality of circumstances test risked the introduction of an involuntary confession *in the prosecutor's case in chief*. (384 U.S. at 457.)

Moreover, the introduction of an involuntary confession cannot form the basis of a Section 1983 claim against the police officer because, as this Court has held, the procedural mistake is a *trial* error. (*Arizona v. Fulminante*, 499 U.S. 279, 310 (1991).) A trial judge's mistake in admitting a coerced statement does not expose a police officer to liability. (*Duncan v. Nelson*, 466 F.2d 939, 942 (7th Cir. 1972).) The Ninth Circuit's holding in *Martinez* renders these precedents meaningless, since regardless of whether

the involuntary statement is entered into evidence at trial, the police officers face civil liability.

Thus, the Ninth Circuit's position that a Fifth Amendment violation is complete at the moment coercive police conduct occurs is indefensible. Both the text of the Fifth Amendment, and long-standing Supreme Court decisions, establish that the Fifth Amendment is a trial right, which can only be violated when the incriminating statement is introduced at trial, in the prosecutor's case-in-chief, against the declarant.

II. THE NINTH CIRCUIT'S POSITION HAS A HARMFUL IMPACT ON LAW ENFORCEMENT

Relying solely on *Cooper*, *Martinez* holds that a Section 1983 claim may be asserted based on the police officer's conduct during a custodial interrogation. The dissent in *Cooper* persuasively argued that the remedy for obtaining a coerced statement is the suppression of the statement at trial, not the subjection of the police officer to civil liability under Section 1983. (*Cooper*, 963 F.2d at 1253.) Similarly, the Eleventh Circuit in *Jones*, *supra*, held that the appropriate remedy for an involuntary confession is the exclusion of the confession from evidence, not a civil suit against the police officer. (*Jones*, 174 F.3d at 1290-1291.)

Indeed, this Court has recognized that the suppression of statements obtained through willful or negligent police conduct will deter further violations of the Fifth Amendment: "By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an

accused." (*Michigan v. Tucker*, 417 U.S. 433, 447 (1974).) The imposition of civil liability on those same police officers does not have a deterrence effect so much as it imposes a chilling effect on law enforcement's ability to conduct investigations.

The Fifth Amendment results in the suppression of a statement not only where the officer commits outrageous conduct, but also where, depending on the circumstances, the statement is "obtained by any direct or implied promises, however slight," any subtle psychological pressure, or even "so mild a whip as the refusal . . . to allow a suspect to call his wife until he confessed." (*Malloy v. Hogan*, 378 U.S. 1, 7 (1964).) Courts have held that a promise to inform the government prosecutor about a suspect's cooperation does not render a subsequent statement involuntary, even when it is accompanied by a promise to recommend leniency or by speculation that cooperation will have a positive effect. (*United States v. Leon-Guerrero*, 847 F.2d 1363, 1366 (9th Cir. 1988); *United States v. Curtis*, 562 F.2d 1153 (9th Cir. 1977).) Other courts have held that an agent's threat to communicate the suspect's failure to cooperate to the prosecutor renders the confession involuntary. (*United States v. Tingle*, 658 F.2d 1332, 1335 fn. 5 (9th Cir. 1981).)

Whether an interrogation fell within the ambit of impermissible conduct under the law is usually determined at a suppression hearing. A judge aided by legal training, trial experience, and legal research, makes a determination in light of the totality of the circumstances whether the suspect's statement was the result of a free will, or whether it was the by-product of a will overborne. (*Withrow v. Williams*, 507 U.S. at 693-694.) Unlike the judge at a suppression hearing, police officers in the field

are "supposed to act decisively and to show restraint at the same moment, and their decisions have to be made in haste, under pressure, and frequently without the luxury of a second chance", and must "make split-second judgments in circumstances that are tense, uncertain and rapidly evolving." (*Sacramento v. Lewis*, 523 U.S. 833, 853 (1998) (Internal citations omitted).) The officer's decisions are made without the benefit of a legal education, research memoranda, and the time needed to consider the totality of circumstances.

Under *Martinez* and *Cooper*, the police officer faces exposure to civil liability, punitive damages and attorneys fees if he so much as utters a set of words that may later be deemed an improper promise of leniency versus a recitation of the natural consequences of the suspect's conduct. The specter of personal liability can only interfere with and chill the police officer's discharge of his duties in investigating crimes and locating culprits.

This is not to say that there should be no civil liability for violation of a person's constitutional rights in the station house. In cases of outrageous police conduct that "shocks the conscience", a police officer may face civil or even criminal liability. There is a public policy appeal to the idea that outrageous conduct shocking the conscience deserves strong deterrence in the form of exposure to civil liability, since shocking conduct is easily discerned, and a certain amount of willfulness is required to continue on that course. The same deterrence argument does not apply to lesser types of presumptively coercive conduct.

It is important to note that the police conduct at issue in *Cooper* was indeed so shocking and outrageous that there was no need for the Ninth Circuit to break new

ground by holding that the Fifth Amendment violation was complete upon the occurrence of the police conduct. In *Cooper*, the police officers admitted that they deliberately planned and carried out a coercive interrogation, knowing it was against the law, and knowing that it would be suppressed from the prosecution's case in chief. Even the *Cooper* court acknowledged that it was not dealing with "a product of police interrogation that is just technically involuntary, or presumptively involuntary," but with actively and intentionally compelled and coerced statements. (963 F.2d at 1243.)

Martinez applies the *Cooper* holding, which arose from a purposeful, calculated, pre-determined disregard of a suspect's rights, to all cases in which, under the totality of circumstances, the police conduct is later deemed to have violated the right against self-incrimination because it implied a promise or contained a veiled threat. The impact of the *Martinez* holding on law enforcement can only be described as harmful.

CONCLUSION

The judgment of the Court of Appeals should be reversed because it deliberately ignores the text of the Fifth Amendment, Supreme Court precedent, and because it imposes a harmful chilling effect on the investigative work of law enforcement.

Respectfully submitted,

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